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No. 56625-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

RAJVIR PANAG, on behalf of herself and all others similarly situated,
Respondent/Cross-Appellant,

v.

FARMERS INSURANCE COMPANY, a domestic insurance company,
and CREDIT CONTROL SERVICES, INC. d/b/a CREDIT
COLLECTION SERVICES,
Appellants/Cross-Respondents.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2006 DEC 14 AM 11:22

CREDIT CONTROL SERVICES, INC.'S OPENING BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
	A. The Discovery Order Must Be Reversed Because Panag, the Identified Class Representative, Has No Standing to Assert a CPA Claim Against CCS.	3
	B. The Discovery Order Must Be Reversed Because This Case Was Terminated.	3
IV.	STATEMENT OF THE CASE.....	4
	A. The Automobile Accident Involving Uninsured Motorist, Panag.	4
	B. Farmers Paid Panag for Her Property Damage and Personal Injuries, and Paid Hamilton for His Property Damage.	5
	C. Panag’s Post-Accident Actions Including Retention of Counsel.	5
	D. Farmers’ Retention of CCS to Recover in Subrogation.....	6
	E. Panag’s Actions in Response to the CCS Letters.	8
	F. Panag Sues CCS and Farmers, Asserting Inapplicable Causes of Action, and The Trial Court Concludes That CCS is Entitled to Judgment as a Matter of Law.....	8
	G. The Trial Court Orders Discovery and This Court Enters a Stay.	10
	H. This Court Confirms That Panag’s Case Was Terminated by the Dismissal of Her Claims.	12

V.	ARGUMENT	13
A.	Summary of Arguments Why The Discovery Orders Must Be Reversed.	13
B.	Panag Cannot Obtain Discovery Under a CPA Claim As She Has No Standing to Assert Such a Claim.	14
1.	The CPA Does Not Apply to Adversaries Who Are Not Consumers and Cannot Stand in the Shoes of Consumers.....	14
2.	The Attempt by Panag, a Non-Consumer, to Reap Benefits Intended for Consumers Under the CPA Undermines the Purpose and Scope of the CPA.....	20
3.	Because Panag has No Standing to Assert a CPA Violation, She Cannot Be Permitted to Obtain Discovery on the CPA Elements.....	22
C.	CCS Cannot Be Compelled to Produce Widespread Discovery Absent an Existing Plaintiff With a Cognizable Claim.	22
1.	The Trial Court's Dismissal of All Claims Asserted by the Only Named Plaintiff Terminated This Case.....	23
2.	The Trial Court's Act of Ordering Discovery is Tantamount to Compelling CCS to Produce Discovery Absent Any Ongoing Litigation.	24
VI.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<i>Blake v. Federal Way Cycle Center,</i> 40 Wn. App. 302, 698 P.2d 578 (1985)	18
<i>Boggs v. Whitaker, Lipp & Helea, Inc., P.S.,</i> 56 Wn. App. 583, 784 P.2d 1273 (1990)	17, 19
<i>Chevalier v. Baird Sav. Ass'n,</i> 66 F.R.D. 105 (E.D.Pa. 1975)	25
<i>Cowiche Canyon Conservancy v. Bosley,</i> 118 Wn.2d 801, 828 P.2d 549 (1992)	25
<i>Eastlake Const. Co., Inc. v. Hess,</i> 102 Wn.2d 30, 686 P.2d 465 (1984)	20
<i>Federal Trade Comm'n v. Sperry & Hutchinson Co.,</i> 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)	18, 19
<i>First State Ins. Co. v. Kemper Nat. Ins. Co.,</i> 94 Wn. App. 602, 971 P.2d 953 (1999)	14
<i>Green v. Holm,</i> 28 Wn. App. 135, 622 P.2d 869 (1981)	15
<i>Hawthorne v. Mac Adjustment, Inc.,</i> 140 F.3d 1367 (11th Cir. 1998)	16
<i>Johnny's Seafood Co. v. City of Tacoma,</i> 73 Wn. App. 415, 869 P.2d 1097 (1994)	6
<i>La Mar v. H & B Novelty & Loan Co.,</i> 489 F.2d 461 (9th Cir. 1973)	25
<i>Mahler v. Szucs,</i> 135 Wn.2d 398, 957 P.2d 632 (1998)	6
<i>Marley v. Department of Labor and Industries of State,</i> 125 Wn.2d 533, 886 P.2d 189 (1994)	26

<i>Marsh v. General Adjustment Bureau, Inc.</i> , 22 Wn. App. 933, 592 P.2d 676 (1979)	15
<i>McCarter v. State Farm Mut. Auto Ins. Co.</i> , 113 Ill.App.3d 97, 473 N.E.2d 1015 (Ill. Ct. App. 1985).....	16
<i>Nestegard v. Inv. Exch. Corp.</i> , 5 Wn. App. 618, 489 P.2d 1142 (1971)	24
<i>Perry v. Island Sav. & Loan Assn.</i> , 101 Wn.2d 795, 684 P.2d 1281 (1984)	21
<i>Sing v. John L. Scott, Inc.</i> , 134 Wn.2d 24, 948 P.2d 816 (1997)	17, 18
<i>State v. Black</i> , 100 Wn.2d 793, 676 P.2d 963 (1984)	17
<i>Travis v. Washington Horse Breeders Assn.</i> , 111 Wn.2d 396, 759 P.2d 418 (1988)	21
<i>Wash. State Physicians Ins. Exchange & Assn. v. Fisons</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	15
<i>Weiner v. Bank of King of Prussia</i> , 358 F.Supp. 684 (E.D.Pa. 1973).....	25

Statutes

Fair Debt Collection Practices Act, 15 U.S.C. § 1692.....	16
Federal Trade Commission Act, 15 U.S.C. § 45	17
RCW 19.86	14, 17, 19, 20, 21
RCW 46.29	5
RCW 46.30	4

Other Authorities

Allen D. Windt, Insurance Claims and Disputes, § 10:5 at 221 (4th ed. 2001)	6
Laws of 1961, § 20, Ch. 216.....	14
Washington Appellate Practice Deskbook, § 6.3(2), at 6-7 (3rd Ed. 2005).....	24

Rules

CR 11	26
CR 23	29
CR 23(c).....	24
CR 26	22

I. INTRODUCTION

This case, styled as a class action, is about one uninsured motorist, Plaintiff/Respondent Rajvir Panag (“Panag”), who was partially at fault for a two-car accident that resulted in property damage and bodily injury. The driver of the other vehicle involved in the accident, Deven Hamilton, was insured by Defendant/Respondent Farmers Insurance Company of Washington (“Farmers”).

Panag failed to carry mandatory liability insurance in violation of Washington law. As a result, Farmers paid expenses attributable to the damage caused by Panag under Farmers’ uninsured motorist coverage. Thereafter, Farmers exercised its subrogation rights and sought reimbursement for sums paid on Panag’s behalf. To do so, Farmers utilized the services of Defendant/Respondent Credit Control Services, Inc. (“CCS”) (a subrogation recovery specialist).

Panag sued Farmers and CCS, alleging that these recovery efforts violated the Consumer Protection Act (“CPA”). CP 1-13, 132-43. Farmers filed a motion for summary judgment (which CCS joined) seeking dismissal of Panag’s CPA claim because, *inter alia*, Panag -- who was not a consumer and not able to stand in the shoes of a consumer -- lacked standing to raise a CPA claim. CP 280-82, 426-47, 820-22. The trial court dismissed all of Panag’s claims. CP 387-88. Despite the

absence of a viable claim and the absence of a certified class, the trial court ordered ongoing discovery to assist Panag's counsel in identifying other potential plaintiffs. Before this Court as part of this appeal are the trial court's rulings that erroneously require CCS to produce discovery.¹

As this brief will demonstrate, for the trial court to dismiss the claim of that class representative while attempting at the same time to treat the action as continuing for purposes of discovery against CCS and Farmers is manifestly unfair and subverts the litigation process by improperly continuing a terminated action.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering portions of the July 1, 2005 Order that required CCS to produce discovery. CP 389.

2. The trial court erred by entering portions of the July 29, 2005 Order Denying in Part CCS's Motion to Stay Discovery that required CCS to produce discovery. CP 391-92.

3. The trial court erred by deferring the inevitable dismissal of Panag's claims on June 10, 2005, in an attempt to allow Panag's counsel additional time to identify and locate a new plaintiff. CP 394-402.

¹ At issue in the cross-appeal is whether the trial court properly dismissed Panag's CPA claim.

4. The trial court erred by entering portions of the April 22, 2005 Order Granting in Part Defendant Credit Control Services, Inc.'s Motion to Quash and for Protective Order that required CCS to produce discovery. CP 404-07.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The Discovery Order Must Be Reversed Because Panag, the Identified Class Representative, Has No Standing to Assert a CPA Claim Against CCS.

The CPA has never been used to shield uninsured motorists who are responsible for causing damage to others (such as Panag) from subrogation efforts to recoup payments made to the damaged victim(s). Given that Panag -- who is not a consumer, nor one who could stand in the shoes of a consumer -- lacks standing to assert a claim against CCS under the CPA, did the trial court err by ordering CCS to produce discovery on CPA elements? CP 389, 391-92, 404-07.

B. The Discovery Order Must Be Reversed Because This Case Was Terminated.

The trial court concluded that CCS was entitled to judgment as a matter of law on all claims asserted by the only named plaintiff (Panag), thereby entering a final judgment that terminated this case. CP 387-89, 394-402. Despite this, the trial court ordered CCS to produce discovery far beyond the scope of any putative class that Panag herself could have

represented. More striking, the purpose of the order was to assist Panag's counsel in locating a named plaintiff and putative class representative who could potentially satisfy all elements of a CPA claim against CCS. CP 389. Did the trial court err by entering the July 1, 2005 discovery order?

IV. STATEMENT OF THE CASE

A. The Automobile Accident Involving Uninsured Motorist, Panag.

On October 5, 2003, Panag was involved in a two-vehicle accident at an uncontrolled intersection at 28th Avenue NW and NW 58th Street in Seattle, Washington (hereinafter "the accident"). CP 681. A Seattle police officer investigated the accident and recorded on an incident report information provided by Panag on her driver's license and a document she produced that appeared to confirm proof of insurance. CP 682.

The other driver involved in the accident, Deven Hamilton, was insured by Farmers. It was later confirmed, however, that Panag was uninsured at the time of the accident in violation of Washington law and that Panag knew she had failed to make payment to maintain her previous liability insurance.² CP 766; *see* RCW 46.30 (Mandatory Liability

² Panag had previously carried insurance through Dairyland Insurance Company ("Dairyland"). She failed to make payments on the policy some weeks earlier and Dairyland cancelled coverage. CP 766.

Insurance Act); RCW 46.29 (Financial Responsibility Act). Indeed, the proof of liability insurance she provided to the Seattle police officer was invalid, also in violation of Washington law. CP 745.

B. Farmers Paid Panag for Her Property Damage and Personal Injuries, and Paid Hamilton for His Property Damage.

As a result of the accident, Panag's vehicle was totaled and Hamilton's vehicle sustained substantial property damage. CP 134, 158, 222. The licensed insurance adjusters involved ultimately agreed that each driver was partially at fault for the accident. Hamilton's insurer, Farmers, paid Panag \$4,881.55 for damage to her vehicle and \$750.00 for her car rental. CP 256-257; 432; 732-735. Farmers also paid \$4,500 to Panag for her bodily injury claims, which she had alleged amounted to \$19,500. CP 711-713; 732-735; 747-748; 750-753. In addition, Farmers paid \$6,102.52 to Hamilton for property damage to his vehicle, and Hamilton paid Farmers a \$340.00 deductible. CP 751.

C. Panag's Post-Accident Actions Including Retention of Counsel.

After the October 5, 2003 accident and before November 3, 2003, Panag contacted and retained an attorney to represent her with regard to various aspects of her dispute relating to the accident.³ CP 345-346; 699-700; 710; 762. Notably, Panag's attorney was negotiating personal injury

³Panag's attorney temporarily pursued Dairyland for denying Panag's claim before learning that Panag had failed to pay her insurance premium. CP 759; 766.

and property damage claims on behalf of Panag against Hamilton and his insurer, Farmers. CP 764; 691; 755-757.

D. Farmers' Retention of CCS to Recover in Subrogation.

After Farmers paid for property damage to Hamilton's vehicle, Farmers became subrogated to Hamilton's interest against Panag for her liability in causing the car accident.⁴ CP 134; 158. Farmers retained CCS, a subrogation recovery specialist, to recover the portion of the sum paid by Farmers that was attributable to Panag, *i.e.*, \$6,442.53. CP 146; 158. In an attempt to recover this subrogated amount, CCS mailed three letters to Panag, which are discussed below. CP 146; 148-149; 158; 433; 454-461.

On November 10, 2003, CCS sent Panag a letter seeking either insurance coverage information or, alternatively, payment in connection with its recovery efforts. CP 454-56. This letter clearly stated in bold print that it was in connection with a "SUBROGATION CLAIM" regarding Farmers Insurance. Listed immediately below those words was the line: "AMOUNT DUE: \$6,442.53." CP 454. The letter provided Panag with

⁴ Subrogation is an equitable right which exists as a matter of law when an insurance company pays its insured for a claim. *See, e.g.,* Allen D. Windt, INSURANCE CLAIMS AND DISPUTES, § 10:5 at 221 (4th ed. 2001). The doctrine of subrogation "seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it." *Mahler v. Szucs*, 135 Wn.2d 398, 412, 957 P.2d 632 (1998); *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994) (explaining that the subrogating insurer "steps 'into the shoes'" of its insured).

the options of either providing proof of insurance or remitting payment, explaining as follows:

Unless you can provide this office with evidence of insurance coverage that existed on the date of loss, our client will consider you financially responsible.

CP 454. CCS mailed this letter to Panag's 12345 Lake City Way, #120, Seattle, Washington mailing address, but received no response. CP 433; 454-457. *Id.* By this date, Panag's attorney had already begun settlement negotiations with Farmers. CP 764.

On December 1, 2003, CCS mailed a second letter to Panag's mailing address. CP 458-59. As with the first, letter, this letter also clearly stated in bold and conspicuous print that it was a "SUBROGATION CLAIM" regarding Farmers Insurance and again listed immediately below "AMOUNT DUE: \$6,442.53." CP 458. This letter stated that Panag had not responded to the November 10, 2003 letter:

You have failed to respond to our notice requesting full payment -or- evidence of insurance coverage that existed on the date-of-loss.

CP 458. The letter requested that Panag immediately provide insurance information or, alternatively, provided options for payment, including check, credit card, and/or a payment plan. CP 458. After talking with her attorney, Panag still believed she did not owe any money, and did not

contact CCS to inquire about the claim or provide proof of insurance. CP 698-699; 736-737; 739; 741-744.

On December 22, 2003, CCS sent a third letter to Panag's mailing address. CP 461. This letter advised of Farmers' rights and remedies in the event that Panag failed to voluntarily satisfy the claim. CP 461. Panag maintains that she did not read this letter until March 30, 2004. CP 709. Panag reportedly called her attorney sometime in April 2004, and later mailed the last letter to him. CP 710. Still, she did not provide any response to this letter.

E. Panag's Actions in Response to the CCS Letters.

Panag never personally contacted CCS in response to receiving any of the three CCS letters. CP 730-731; 738; 698-699. Other than seeking advice and counsel from her attorney (who she had already retained prior to receiving the CCS letters), Panag herself testified that she took no other action in response to receiving the CCS letters. CP 716; 721-724; 726-729.

F. Panag Sues CCS and Farmers, Asserting Inapplicable Causes of Action, and The Trial Court Concludes That CCS is Entitled to Judgment as a Matter of Law.

Even though she admitted that the three CCS letters caused her no damage, Panag filed a lawsuit against CCS and Farmers on May 19, 2004, alleging she suffered injury under the CPA when she received the first

letter from CCS.⁵ CP 132-143; 1-13. Moreover, even though she was not a consumer in any transaction with Farmers or CCS, could not stand in the shoes of such a consumer, and was in an adversarial relationship with Farmers and CCS, Panag alleged that the actions of CCS and Farmers had somehow violated her rights as a consumer. CP 132-143; 1-13. Although Panag's lawsuit purported to have been filed as a class action lawsuit "on behalf of herself and all others similarly situated," no other plaintiff was ever identified and class certification was never even sought. CP 132.

In response to Panag's efforts to seek discovery related to the CPA elements, CCS sought an order to stay discovery until the trial court was able to determine whether Panag could even assert a CPA claim. CP 404-07. CCS also sought limits on the scope of discovery sought. CP 404-07. The trial court granted that motion in part, but ultimately ordered CCS to produce discovery.⁶ CP 404-07.

Farmers filed a motion for summary judgment (which CCS joined) seeking dismissal of Panag's CPA claim because, *inter alia*, Panag was a non-consumer and unable to stand in the shoes of a consumer, and

⁵ Panag also asserted an unjust enrichment claim, which was dismissed by the trial court early in this case. CP 1-13, 253-54. Because the dismissal of that claim is not being challenged as part of this appeal or Panag's cross-appeal, it is not relevant to the analysis set forth herein and will not be discussed further. CP 417-18 (listing orders from which Panag seeks review).

⁶ The trial court also ordered Farmers to produce discovery.

therefore she lacked standing to raise a CPA claim. CP 280-82, 426-47. The trial court concluded that Farmers and CCS were entitled to judgment as a matter of law on the CPA claim, thereby dismissing the only named plaintiff's sole remaining claim. CP 387-88, 394-402. Although the trial court advised the parties of this conclusion on June 10, 2005, the written order was not entered until July 1, 2005. CP 389, 394-402.

G. The Trial Court Orders Discovery and This Court Enters a Stay.

After the trial court advised the parties that all of Panag's claims were dismissed on summary judgment, there no longer existed a plaintiff capable of prosecuting a case against CCS. Remarkably, particularly given that there had been no effort to certify a class, the trial court went on to enter an order that compelled CCS to actively participate in the efforts of Panag's counsel in their quest to identify a potential new named plaintiff who could then serve to prosecute a claim against CCS. CP 389.

On July 1, 2005, in the same order confirming the dismissal of Panag's claims, the trial court instructed CCS to produce discovery far beyond the scope of any putative class that even Panag could have represented, had she remained in the case. CP 389. Moreover, the trial court explained that the purpose of the discovery was to provide Panag's *counsel* with access to CCS records for the express purpose of locating

and designating as named plaintiffs and putative class representatives who *might* be able to establish a viable CPA claim against CCS:

2. Within 30 days of the date of this Order, Defendant Farmers and/or CCS shall provide to plaintiff's counsel a list of all persons who, since May 18, 2000, were sent notices substantially similar to the November 10, 2003 collection notice sent to plaintiff in this matter and which were contested or objected to. Farmers or CCS shall also include with the list all contact information it possesses for each such person listed, and indicate with respect to each whether that person submitted any money or consideration of any sort to either CCS or Farmers. These notices are only for subrogation of auto insurance claims, not other collections by CCS/Farmers.

3. Following receipt of the lists, Plaintiff's counsel may contact, in writing, all or any one or more of the persons on the list provided by CCS and/or the list provided by Farmers, in order to advise such persons of the pendency of this action, and thereafter to determine whether any one or more of such persons are interested in joining this action as an additional party plaintiff and potential representative of the putative class.

4. No later than 30 days after both lists, with contact information, have been provided to plaintiff's counsel, plaintiff may file a motion seeking to amend the complaint to add additional party plaintiff(s).

CP 389.⁷ The trial court imposed an August 15, 2005 deadline for production of that discovery. CP 391-92.

On August 1, 2005, following the trial court's denial of Pang's Motion for Reconsideration, CCS timely appealed to this Court. CP 853.

⁷ The trial court's July 1, 2005 order is attached hereto as Exhibit A.

CCS also obtained from this Court a formal stay of the trial court's discovery order pending the outcome of this appeal. CP 384-407.⁸

H. This Court Confirms That Panag's Case Was Terminated by the Dismissal of Her Claims.

Panag filed a Notice of Discretionary Review instead of a Notice of Appeal, which raised an issue as to whether this case should proceed as an appeal of right or as a motion for discretionary review. CP 417-25. After consideration of briefing and oral argument, Commissioner James Verellen confirmed that the trial court's July 1, 2005 order, which dismissed Panag's CPA claim and instructed CCS to produce discovery, was "appealable as a final judgment under RAP 2.2(a)(1)." Notation Ruling, at 3 (Comm. Verellen) (entered on August 24, 2005). In that ruling, Commissioner Verellen explained as follows:

Even though the July 1, 2005 order directed additional discovery for the purpose of allowing Panag's counsel to seek new plaintiffs, the order expressly and unequivocally granted summary judgment dismissing the only claims before the court. The July 1, 2005 ruling was not a grant of discovery for purposes of giving further consideration to Panag's claims or to settle any pending issues that remained in the litigation. Because the July 1 order settled all the issues in the case, it is appealable as a final judgment.

⁸ See CCS's Emergency Motion to Stay Enforcement of Discovery (filed in this Court on August 3, 2005); Notation Ruling staying discovery (Comm. Verellen) (entered on August 8, 2005); Notation Ruling ordering that discovery remain stayed pending further order of this court at the conclusion of this appeal (Comm. Verellen) (entered on August 24, 2005).

Following this ruling, this case has appropriately proceeded as an appeal as a matter of right, with CCS and Farmers as the appellants and Panag as the cross-appellant. Before this court as part of this appeal are the trial court's rulings that erroneously require CCS to produce discovery. At issue in Panag's cross-appeal is whether the trial court properly dismissed Panag's CPA claim.

V. ARGUMENT

A. Summary of Arguments Why The Discovery Orders Must Be Reversed.

The trial court's discovery orders compelled CCS⁹ to itself analyze and then produce a vast amount of business and accounting records sought by Panag as part of her effort to prosecute a CPA claim against CCS. Although Panag filed this lawsuit as a class action, she never identified any other plaintiff and never sought class certification. Indeed, the discovery order was entered at a time when there existed not a single named plaintiff with a cognizable claim against CCS. According to the express language on the face of the discovery order, the trial court imposed significant discovery obligations on CCS (far beyond the scope of the putative class that Panag could have represented) in an effort to

⁹ Farmers was also compelled to produce discovery. Therefore many, if not all, of the arguments set forth herein are equally applicable to Farmers.

locate a potential new plaintiff who might be able to prove a CPA claim against CCS.

The trial court's discovery orders must be reversed both because Panag lacks standing to assert a CPA claim against CCS and because the dismissal of all claims brought by the only named plaintiff (Panag) was a final order that terminated this case. Therefore, neither Panag nor her counsel are entitled to receive further discovery from CCS.

B. Panag Cannot Obtain Discovery Under a CPA Claim As She Has No Standing to Assert Such a Claim.

1. The CPA Does Not Apply to Adversaries Who Are Not Consumers and Cannot Stand in the Shoes of Consumers.

The Washington Consumer Protection Act only protects *consumers* of the goods or services sold or offered for sale by the party charged with a violation of the Act. *See, e.g.*, RCW 19.86.010-.020; Laws of 1961, § 20, Ch. 216. It does not protect parties whose only connection with one another is through an automobile accident where the underlying parties' interests were adverse from the beginning.¹⁰

¹⁰ "Because the insurance company is standing in the shoes of the insured consumer, it logically follows that it may pursue the rights of its insured." *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 971 P.2d 953, 958 (1999) (footnote omitted).

Washington courts have never recognized third party CPA actions brought against an adverse party's insurer or the insurer's agent. *See, e.g., Green v. Holm*, 28 Wn. App. 135, 137, 622 P.2d 869 (1981); *Marsh v. General Adjustment Bureau, Inc.*, 22 Wn. App. 933, 936-37, 592 P.2d 676 (1979). In *Marsh*, the Court expressly confirmed that a consumer relationship was a prerequisite to a CPA action, not the adverse relationship between a subrogating insurer and claimant. *Marsh*, 22 Wn. App. at 936-37. A very similar relationship between the parties found insufficient in *Marsh* is of course the relationship present here (agent for a subrogating insurer and third party tortfeasor).

The Washington Supreme Court's decision in *Washington State Physicians Insurance Exchange & Assn. v. Fisons*, 122 Wn.2d 299, 313, 858 P.2d 1054 (1993), acknowledged that while a plaintiff is not required to show a *direct* consumer relationship with the defendant to have standing to assert a violation of the CPA, the claimant must be able to assert a consumer relationship that was at the minimum *indirect*. Critical to the *Fisons* analysis was the threshold showing that the consuming public or some consumer of the defendant's goods or services was injured by the defendant's conduct. No such injury to the consuming public has been or can be shown here as parties to an accident are not consumers.

Indeed, all published Washington appellate cases interpreting the CPA require a plaintiff to be either a direct consumer or one standing in the shoes of a consumer seeking to protect the consuming public's interests as a prerequisite to establishment of a CPA cause of action. None of the CPA jurisprudence stands for the proposition that a tortfeasor whose interests are completely adverse to the party to be charged may assert a CPA claim against his adversarial victim, that victim's subrogating insurer, or its agent. Notably, analogous federal law and law from other states confirm the threshold requirement that a consumer relationship is required. *See, e.g., Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371-72 (11th Cir. 1998) (holding that the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., was inapplicable to an attempted subrogation recovery against uninsured third party tortfeasor); *see also McCarter v. State Farm Mut. Auto Ins. Co.*, 113, Ill.App.3d 97, 101, 473 N.E.2d 1015, 1018 (Ill. Ct. App. 1985) (motorcyclist who collided with a car driven by State Farm's insured could not bring a consumer protection claim against State Farm for settling the motorcyclist's third-party claim against State Farm's insured; "the transaction complained of ... does not involve a sale of insurance. In fact, the plaintiff is not even a consumer under these circumstances.... [W]e affirm the trial court's dismissal of Count I.").

The CPA explicitly directs Washington courts to consider federal decisions construing federal statutes that serve the same purpose as the CPA for assistance in construing the CPA. *See* RCW 19.86.920;¹¹ *Boggs v. Whitaker, Lipp & Helea, Inc., P.S.*, 56 Wn. App. 583, 587 n.6, 784 P.2d 1273 (1990) (citing *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984)). Federal consumer protection statutes mirror the CPA's focus on the requirement of consumer injury. Washington's CPA mirrors its federal counterpart – the Federal Trade Commission Act, 15 U.S.C. § 45 (“FTCA”). Both statutes were designed to protect consumers from unfair or deceptive acts or practices. With respect to damages, the CPA is not a tort-based remedy. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 46, 948 P.2d 816 (1997) (Talmadge, J., dissenting). It is a statutory remedy based on section 5 of the Federal Trade Commission Act, “the purpose of which is

¹¹ The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

RCW 19.86.920 (emphasis added).

to forestall unfair or deceptive acts or practices in trade or commerce.” *Id.* at 47.

In *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985), this Court recognized that the CPA identifies federal court interpretations of federal statutes dealing with matters similar to those involved in the CPA as persuasive precedent in adjudicating CPA claims on summary judgment. As in *Sing*, the *Blake* court identified section 5 of the FTCA for establishment of three criteria that determine whether a practice or act is unfair:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).

Id. (citing *Federal Trade Comm’n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 905 n.5, 31 L.Ed.2d 170 (1972)).

According to the Federal Trade Commission, the most important of the above criteria for establishing unfairness is unjustified consumer injury. Before consumer injury can be found to be unjustified or “unfair,” the injury to consumers must be substantial; it must not be outweighed by any countervailing factors; and the injury must be one that consumers reasonably could not have avoided.

Id. (citing FTC letter of December 17, 1980, 5 Trade Reg. Rep. (CCH) § 50,421) (emphasis added).

The U.S. Supreme Court in *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. at 244, explained:

The amendment added the phrase “unfair or deceptive acts or practices” to the section’s original ban on “unfair methods of competition” and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: “[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.” HR Rep No. 1613, 75th Cong, 1st Sess, 3 (1937). *See also* S.Rep No. 1705, 74th Cong, 2d Sess, 2-3 (1936).

Boggs v. Whitaker, Lipp & Helea, Inc., P.S., 56 Wn. App. 583, 587-88, 784 P.2d 1273 (1990) (emphasis added). Unfair or deceptive conduct subject to the FTCA and RCW 19.86.920 concerns the solicitation or public offering of goods or services, not resolution of an insurer’s subrogation claim against an uninsured motorist. The Washington Supreme Court has opined:

The protection afforded under federal trade regulations is primarily for the public at large, rather than the individual consumer. Under 15 U.S.C. § 45(b) (1970), the Federal Trade Commission Act authorized federal action against violators only if it is in the public interest. A common element running through all the types of conduct found by the Commission to be unfair or deceptive is solicitation or public offering. It is the unfair or deceptive practice which

has a tendency to mislead the consuming public that is the gist of the Federal Trade Commission Act. *See* Comment, Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Actions, 10 Gonzaga L.Rev. 457 (1975); Leaffer & Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo.Wash.L.Rev. 521 (1980).

Eastlake Const. Co., Inc. v. Hess, 102 Wn.2d 30, 54, 686 P.2d 465 (1984) (Rosellini, J., dissenting in part). If, as here, there is no conduct directed towards the “consuming public,” then the FTCA and RCW 19.86.920 do not apply. These statutes mandate protection for the public against unfair or deceptive conduct in the context of consumer transactions, which does not exist in this case.

2. The Attempt by Panag, a Non-Consumer, to Reap Benefits Intended for Consumers Under the CPA Undermines the Purpose and Scope of the CPA.

As discussed above, a plaintiff is only permitted to assert a violation of the CPA when that plaintiff or the consuming public has suffered unfair or deceptive acts or practices committed by businesses in connection with the consumer side of their business, not when they are protecting their interests from adverse claims. The CPA simply does not apply where, as here, the plaintiff is a non-consumer and tortfeasor seeking to escape a valid obligation to pay on a subrogated claim that arose out of a claimant’s tort instead of the requisite consumer-based

transaction. The fact that CCS sought to recover this subrogated claim on behalf of an insurance company did not transform Panag into a consumer of services for purposes of establishing a CPA violation.

The CPA should not be construed to prohibit acts or practices that are reasonably related to the development and preservation of business, or which are not injurious to the public interest. RCW 19.86.920. Acts which are done in good faith under an arguable interpretation of the law are not CPA violations. *Perry v. Island Sav. & Loan Assn.*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984). Acts which bear a reasonable relationship to the development and preservation of business are not CPA violations. *Travis v. Washington Horse Breeders Assn.*, 111 Wn.2d 396, 408, 759 P.2d 418 (1988).

Moreover, public policy confirms that the CPA does not and should not apply to this instant case. Panag, who was partly at fault for an automobile accident and failed to carry the mandatory insurance required by statute, is here seeking to leverage the CPA to cover for her own failures. Uninsured motorists such as Panag who are responsible for causing property damage and personal injury to others cannot be permitted to obtain protection under the CPA for the reasonable actions taken by the victim's insurance companies and their agents in seeking to recover subrogation claims from the tortfeasor to which they are entitled. Indeed,

the mandatory insurance laws and the whole system of compulsory insurance, adjustment of claims, etc., is well established. It recognizes the adversary nature of the relationships and includes considerable protections to avoid over reaching by insurance companies.

3. Because Panag has No Standing to Assert a CPA Violation, She Cannot Be Permitted to Obtain Discovery on the CPA Elements.

Thus, Panag -- who is not a consumer, nor one who could stand in the shoes of a consumer -- lacks standing to assert a claim against CCS under the CPA. Because she cannot assert a CPA violation, she cannot obtain discovery on the CPA elements. *See* CR 26 (providing limitations on discovery, including the requirement that “the information sought appears reasonably calculated to lead to the discovery of admissible evidence”). Accordingly, this Court should conclude that the trial court erred by ordering CCS to produce discovery on the CPA elements. CP 389, 391-92, 404-07.

C. CCS Cannot Be Compelled to Produce Widespread Discovery Absent an Existing Plaintiff With a Cognizable Claim.

In its July 1, 2005 order, the trial court compelled CCS to first analyze records to find and then to produce broad and burdensome discovery to locate a named plaintiff and putative class representative who could potentially satisfy all elements of a CPA against CCS. CP 389. At

the time this Order was entered, the trial court had already advised the parties that the claims alleged by the only named plaintiff (Panag) could not survive summary judgment. CP 394-402. Absent a plaintiff with a cognizable claim, CCS cannot be compelled to produce further discovery. Therefore, the trial court's July 1, 2005 discovery order must be reversed.

1. The Trial Court's Dismissal of All Claims Asserted by the Only Named Plaintiff Terminated This Case.

As aptly noted by Commissioner Verellen in his Ruling on appealability, the trial court's July 1, 2005 Order disposed of the claims between all of the parties and therefore constituted a final judgment. *See* Notation Ruling (Comm. Verellen) (entered on August 24, 2005).

Ordering CCS to assist counsel for Panag in locating a new named plaintiff did not operate to transform that same Order into an order that did not dispose of all claims. CP 389. As one commentator has observed, the substance of the ruling determines whether an order constitutes a final judgment, not the attempt to reserve ruling on an issue and not the title of the order:

A court will occasionally reach a decision that resolves all the issues between the parties but leaves some details to be implemented by a later order. When this occurs, an appeal is properly taken from the dispositive decision, not from the subsequent orders. It makes little difference whether the decision is denominated a "final judgment," "final decree," "interlocutory decision," or the like. In determining whether a decision is final for purposes of appeal,

substance should prevail over form, and an appellate court will look to whether the decision is actually a final determination of the rights of the parties.

WASHINGTON APPELLATE PRACTICE DESKBOOK, § 6.3(2), at 6-7 (3rd Ed. 2005) (citing *Nestegard v. Inv. Exch. Corp.*, 5 Wn. App. 618, 489 P.2d 1142 (1971)).

Thus, notwithstanding the discovery component of the trial court's July 1, 2005 Order, the trial court made a final determination to dismiss all claims between the parties as a matter of law, thereby terminating this case.

2. The Trial Court's Act of Ordering Discovery is Tantamount to Compelling CCS to Produce Discovery Absent Any Ongoing Litigation.

- a) Panag Cannot Serve as a "Place Holder" in an Uncertified Putative Class Action Lawsuit.

At the time the trial court entered the July 1, 2005 order, the trial court had not been presented with nor ruled upon any motion for class certification. In the absence of any prior class certification, there is no basis for permitting the case to continue pending counsel's quest to find a viable plaintiff. *See* CR 23(c) (explaining that the trial court must enter an order confirming that a class action lawsuit before such an action can be maintained).

Where a plaintiff lacks standing in her own right, she may not pursue a class action lawsuit on behalf of others. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 810, 828 P.2d 549 (1992). The procedural mechanism of a class action does not confer standing that a plaintiff does not otherwise have in an individual capacity. *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 694-95 (E.D.Pa. 1973); *Chevalier v. Baird Sav. Ass'n*, 66 F.R.D. 105, 108-09 (E.D.Pa. 1975). A class representative, therefore, cannot litigate a claim against a defendant who the representative cannot sue individually. *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973).

Notably, Panag never even sought class certification. Moreover, she has herself been found not to have a cognizable claim and her allegations have been dismissed. Under these circumstances, she has no basis upon which to stand as a “place holder” for a putative class of individuals with whom Panag legally or factually can have no commonality or typicality of interests.

b) Panag Lacks Standing to Conduct Discovery.

Panag was a “plaintiff” in name only. Because this Court has found, as a matter of law, that her claims are fatally flawed, she no longer has any standing to prosecute those claims. Consequently, she has no standing to conduct discovery, and nor do her attorneys. In the absence of

a party plaintiff, the lawsuit is an empty shell. In essence, there is no longer any basis for personal jurisdiction over the defendants or subject matter jurisdiction over the putative CPA claim.

Absent personal or subject matter jurisdiction, an order sustaining the life of this lawsuit in the absence of a party plaintiff is manifestly unfair and improper. *Marley v. Department of Labor and Industries of State*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994). It is axiomatic that, in order to commence litigation, an individual must have a personal claim against a defendant.

- c) The Discovery Order is Improper and Highly Prejudicial to CCS.

Finally, the discovery ordered by the trial court – if permitted to stand – would be highly prejudicial to CCS. It was counsel for Panag's own choice to bring their class action complaint with but a single class representative, a representative who had no standing to assert a CPA claim. Counsel for Panag had an affirmative obligation under Civil Rule 11 to ensure the allegations against CCS were well grounded in fact and warranted by existing law prior to filing a complaint. The trial court should not be allowed to now transfer the burden to CCS to assist counsel for Panag to meet the burden they failed to meet. This process would suggest that, even without any complainant with a viable injury and

damages before it, the trial court on its own initiative (and with an apparent predisposition to hold that liability to someone exists) can direct a fishing expedition to allow counsel to find a viable plaintiff to bring the claim the court is predisposed to allow. This is clearly not how our adversarial system of American jurisprudence is supposed to work.

Having fairly met and defeated Panag's allegations, CCS should not be compelled to bear the time, expense, and substantial inconvenience to respond to "discovery" in a lawsuit that no longer is supported by the essentials of a cognizable proceeding under American jurisprudential principles, *i.e.*, a real plaintiff with a cognizable claim against the alleged defendants. The trial court's July 1, 2005 discovery order has the improper effect of shifting Panag's counsel's pre-suit obligations from Panag to the defendants she ultimately sued.

Given that the trial court affirmatively dismissed all claims asserted by the only named plaintiff (Panag), its subsequent act of ordering CCS to produce discovery was tantamount to compelling CCS to produce discovery absent any ongoing litigation. The trial court extended the power of judicial process to require CCS to submit to discovery to locate a viable plaintiff, absent a single cognizable cause of action. The trial court's July 1, 2005 discovery order simply has no foundation in law or procedure and is inimical to the underlying principles of fairness and due

process. Under these circumstances, the trial court erred by ordering CCS to produce discovery. CP 387-89, 394-402.

VI. CONCLUSION

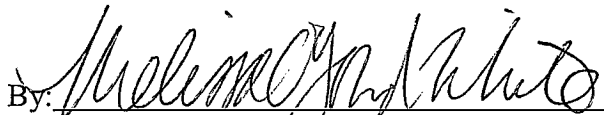
As discussed above, the trial court's discovery orders must be reversed because Panag lacks standing to assert a CPA claim against CCS and therefore is entitled to receive no CPA-related discovery from CCS, and because the trial court had no authority to order further discovery, having already determined that the only named plaintiff (Panag) was unable to sustain any cause of action against CCS.

Based upon the record before this Court and the legal arguments set forth herein, CCS respectfully urges this Court to reverse and vacate portions of the following four orders that compelled CCS to produce discovery: 1) July 1, 2005 Order that required CCS to produce discovery (CP 389); 2) July 29, 2005 Order Denying in Part CCS's Motion to Stay Discovery that required CCS to produce discovery (CP 391-92); 3) June 10, 2005 oral ruling, that provided Panag's counsel with additional time to identify and locate a new plaintiff (CP 394-402); and 4) April 22, 2005 Order Granting in Part Defendant Credit Control Services, Inc.'s

Motion to Quash and for Protective Order that required CCS to produce discovery (CP 404-07).¹²

RESPECTFULLY SUBMITTED this 13th day of December, 2005.

COZEN O'CONNOR

By: 

John A. Granger, WSBA No. 6794

Clarence C. Jones, Jr., WSBA No. 27678

Melissa O'Loughlin White, WSBA No. 27668

Attorneys for Appellant/Cross-Respondent

Credit Control Services, Inc.

¹² If this Court is able to identify some legal basis on which to reverse the trial court's dismissal of Panag's CPA claims, then CCS requests a remand with limiting instructions pertaining to discovery. At a minimum, any discovery ordered must be no broader than the scope of the claim set forth by the named plaintiff. Moreover, any such discovery ordered prior to class certification must be limited to the CR 23 elements necessary to certify a class.

DECLARATION OF SERVICE

Dava Bowzer states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 13th day of December, 2005, I caused to be filed with the Court of Appeals of the State of Washington, Division I, the foregoing **CREDIT CONTROL SERVICE, INC.'S OPENING BRIEF**. I also served copies of said document on the following parties as indicated below:

Parties Served:

Manner of Service:

Counsel for Plaintiff:

Matthew J. Ide
Ide Law Offices
801 Second Avenue, Suite 1502
Seattle, WA 98104-1500

☐ Via Legal Messenger
☐ Via Overnight Courier
☐ Via Facsimile
☒ Via U.S. Mail

Counsel for Plaintiff:

Murray T. S. Lewis
Lewis Law Firm
600 First Avenue, Suite 409
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☐ Via Legal Messenger
☐ Via Overnight Courier
☐ Via Facsimile
☒ Via U.S. Mail

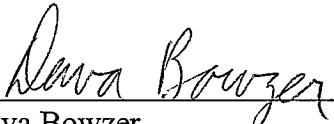
Counsel for Defendant Farmers:

Stevan David Phillips
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101

☐ Via Legal Messenger
☐ Via Overnight Courier
☐ Via Facsimile
☒ Via U.S. Mail

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 13th day of December, 2005.



Dava Bowzer

SEATTLE1\474092\4 154037.000

APPENDIX A

7/1
COPY

RECEIVED
JUL - 6 2005
STOEL RIVES LLP

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7
8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 FOR KING COUNTY

10 RAJVIR PANAG, on behalf of herself and
all others similarly situated,

11 Plaintiff,

12 v.

13 FARMERS INSURANCE COMPANY OF
14 WASHINGTON, a domestic insurance
15 company, and CREDIT CONTROL
16 SERVICES, INC., d/b/a Credit Collection
Services,

17 Defendants.
18

Case No.: 04-2-11732-1SEA

ORDER GRANTING DEFENDANT
FARMERS INSURANCE COMPANY
OF WASHINGTON'S MOTION FOR
SUMMARY JUDGMENT AND

~~PROPOSED~~

DEFERRING DISMISSAL

The Honorable Carol Schapira

19 THIS MATTER came before the Court on Defendant Farmers Insurance Company of
20 Washington's Motion for Summary Judgment. The Court having considered:

21 1. Defendant Farmers Insurance Company of Washington's Motion for Summary
22 Judgment Dismissing Remaining Claim Against Farmers Insurance Company of Washington;
23 Declaration of Stevan P. Phillips in support of Motion for Summary Judgment, and exhibits
24 attached thereto; Declaration of Clarence C. Jones, Jr. in support of Credit Control Services'
25 Motion for Summary Judgment, and exhibits attached thereto;
26

ORDER GRANTING DEFENDANT FARMERS
INSURANCE COMPANY OF WASHINGTON'S
MOTION FOR SUMMARY JUDGMENT- 1

Seattle-3259938 / 0045556-00048

and deferring Dismissal

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101-3197
Telephone (206) 624-0900

1 2. Plaintiff Rajvir Panag's Response in Opposition to Defendant Farmers Insurance
2 Company of Washington's Motion for Summary Judgment;

3 3. Defendants Farmers Insurance Company of Washington's Reply in Support of its
4 Motion for Summary Judgment;

5 4. CCS's Joinder in Farmers' Motion for Summary Judgment;

6 5. Plaintiff's Motion for Leave to Seek Additional Class Plaintiff(s) and to Defer
7 Entering an Order on Farmers' Motion for Summary Judgment;

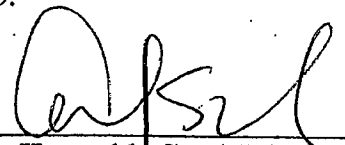
8 6. Farmers' Response thereto;

9 7. Plaintiff's Reply thereto;

10 8. Counsels' argument on Farmers' Motion for Summary Judgment, and the records
11 and files herein, and being fully advised in the premises, it is hereby:


12 ORDERED that: Defendant Farmers Insurance Company of Washington's Motion for
13 Summary Judgment, joined by defendant Credit Control Services, Inc., to dismiss with prejudice
14 plaintiff Rajvir Panag's Consumer Protection Act claim is hereby GRANTED. The plaintiff has
15 suffered no injury cognizable under the Consumer Protection Act. ** See attached*

16
17 DATED this 15th day of JULY, 2005. *page*

18
19 
20 The Honorable Carol Schapira
21 King County Superior Court Judge

22 Presented by:

23 Stoel Rives LLP

24 

25 Stevan P. Phillips, WSBA #2257

26 Rita V. Latsinova, WSBA #24447

 Attorneys for Farmers Insurance Co. of Washington

Added to Order

1 ("CCS"), shall provide to plaintiff's counsel a list of the names of all persons who, since May
2 18, 2000, were sent notices substantially similar to the November 10, 2003 collection notice
3 sent to plaintiff in this matter. CCS shall also include with the list all contact information it
4 possesses for each such person listed, and indicate with respect to each whether that person
5 submitted any money or consideration of any sort to either CCS or Defendant Farmers
6 Insurance Company of Washington ("Farmers").

7 2. Within 30 days of the date of this Order, Defendant Farmers shall provide to
8 plaintiff's counsel a list of all persons who, since May 18, 2000, were sent notices substantially
9 similar to the November 10, 2003 collection notice sent to plaintiff in this matter, ^{and/or CCS} Farmers shall
10 also include with the list all contact information it possesses for each such person listed, and
11 indicate with respect to each whether that person submitted any money or consideration of any
12 sort to either CCS or Farmers. ^{and which were contested or objected to, or CCS}

13 ^{These notices are only for subrogation of auto insurance claims, not other collections by CCS/Farmers.}

14 3. Following receipt of the lists, Plaintiff's counsel may contact, in writing, all or
15 any one or more of the persons on the list provided by CCS and/or the list provided by Farmers,
16 in order to advise such persons of the pendency of this action, and thereafter to determine
17 whether any one or more of such persons are interested in joining this action as an additional
18 party plaintiff and potential representative of the putative class.

19 4. No later than 30 days after both lists, with contact information, have been
20 provided to plaintiff's counsel, plaintiff may file a motion seeking to amend the complaint to
21 add additional party plaintiff(s).

22 5. The Court will defer entering an order ^{dismissing this action} on Farmers' motion for summary
23 judgment at this time: ^{until Sept 1 or another date set by the parties.}

24 6. _____

25 DONE IN OPEN COURT this _____ day of June, 2005.

26 _____
Honorable Carol A. Schapira

ORDER GRANTING PLTF'S MOTION FOR LEAVE TO SEEK
ADD'L CLASS PLAINTIFF(S) AND TO DEER ENTERING
AN ORDER ON FARMERS' MOT. FOR S.J. [PROPOSED] - 2

IDE LAW OFFICES
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104-1576
PH.: 206 625-1326